

Jeep & Blazer, L.L.C. environmental law

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Via Electronic Mail (adler.kevin@epa.gov)

January 2, 2009

Kevin Adler Project Manager **USEPA-Region 5** 77 West Jackson Boulevard Mail Code: SR-6J Chicago, IL 60604-3507

Re:

Proposed Remedial Action Plan For Waukegan Harbor PCB **Contaminated Sediments** Request for Extension of Public Comment Period Until February 11, 2009

Dear Mr. Adler:

This follows our letter of December 2, 2008 in which we requested that the public comment period on the proposed remedial action for Waukegan Harbor be extended until February 11, 2009. On December 3, 2008 we were advised by you that the public comment period had been extended until February 4, 2009. We stated in our December 2 letter (footnote 3) that we "reserve the right to request a further extension of the public comment period if USEPA and NOAA do not respond to our August 8 and November 14 [Freedom of Information Act] requests in a timely manner." USEPA and NOAA have not fully responded to our August 8 and November 14 Requests. Further, the City is informed that USEPA will not respond to the August 8 and November 14 Requests until January 25, 2009. The City therefore requests that the public comment period be extended until March

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4, 2009 to afford the City a meaningful opportunity to participate in the remedy selection process for Waukegan Harbor. It is unrealistic and fundamentally unfair for USEPA to expect City staff to review documents received on January 25, 2009, confer with the City Council and submit comments to USEPA by February 4, 2009. We request a timely written response to this request.

On December 12, 2008, in response to a FOIA request¹ by the City, NOAA transmitted a three page memorandum dated May 16, 2008 prepared by Todd Goeks. The following statement appears at page 3 of the May 16 Memorandum:

Capping hazardous substance contaminated sediments within the federal navigation channel at a depth less than [its authorized depth] would require EPA to seek re-authorization of the federal channel by Congress to the desired depth prior to constructing the remedy. Without reauthorization of the channel depths, placement of a cap within the federal navigation channel at an elevation above the full authorized depth is not an implementable option.

NOAA has not provided the City with any legal analysis to support its position that USEPA does not have authority under CERCLA to select the capping alternative for Waukegan Harbor.

USEPA partially responded to the City's August 8 and November 14 Requests on December 3, 2008² and December 15, 2008³. On December 16, 2008 the City was informed that USEPA will not respond to the City's August 8 and November 14 Requests until January 25, 2009. Please refer to our December 16, 2008 email to USEPA enclosed as **Attachment 1**.

To date, NOAA and USEPA have not provided any documents to the City supporting

¹ The City's November 14, 2008 FOIA request to NOAA requested: "Any and all documents, including but not limited to, all <u>legal analysis</u>, legal and nonlegal memoranda, legal research, and all inter-agency and third party written and electronic correspondence regarding Mr. Adler's statement at the November 13, 2008 Waukegan Harbor clean up plan public hearing in which he asserted that NOAA takes the position that Congressional authorization for depths in navigable waterways much be maintained." (Emphasis Added)

² Your December 3, 2008 electronic mail provided the following documents as attachments: July 2006 Risk Assessment, April 2008 FS, May 16, 2008 Memorandum from NOAA, May 19, 2008 letter from the CAG, September 30, 2008 Response to Comments by the National Review Board, and October 2008 RIFS prepared by CH2M Hill, October 2008 ROD Summary and October 13, 2008 Corrected Risk Assessment prepared by CH2M Hill.

³ USEPA's December 15, 2008 FOIA response included the April 2008 RI Report, the October 2008 Feasibility Study and the October 13, 2008 Technical Memorandum.

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the two purported rationales for the dredging alternative: (1) that USEPA is required by "legal necessity" to select the dredging alternative; and (2) the dredging alternative will have "important redevelopment benefits" for the City. Please refer to our December 2, 2008 letter (pp. 1-2).

By way of example, we offer three the categories of documents the City expects to receive in response to its August 8 and November 14 Requests:

- Documents relating to the reasonably anticipated future use of Waukegan Harbor:
- Documents relating to the purported "legal necessity" to select the dredging alternative; and
- Documents relating to the "community acceptance" of the dredging alternative.

1. Future Use

On June 4, 2001, Larry Reed, Acting Director of USEPA's Office of Emergency and Remedial Response, issued a Memorandum on the subject of "Reuse Assessments: A Tool to Implement the Superfund Land Use Directive" (OSWER 9355.7-06P). The June 4, 2001 Memorandum affirmed a previous USEPA directive entitled, "Land Use in the CERCLA Remedy Selection Process," OSWER Directive No. 9355.7-04, issued in May 1995 (the "Superfund Land Use Directive"). The Superfund Land Use Directive mandates that USEPA make a specific finding with respect to the reasonably anticipated future use of Waukegan Harbor. Such a finding must consider, for example, the Downtown – Lakefront Master Plan unanimously adopted by the Waukegan City Council in July 2003. USEPA is required to make a determination with respect to the reasonably anticipated future use of Waukegan Harbor in the RI/FS⁴. USEPA has followed this procedure when selecting remedial actions at other Operable Units at the OMC Site. The RI/FS prepared by USEPA for Waukegan Harbor, an Operable Unit of the OMC Site, does not comply with the Superfund Land Use Directive. The RI/FS does not even reference the City's Master Plan. How is USEPA to determine the reasonably anticipated future use of the submerged land in

⁴ Please refer to the Superfund Land Use Directive ("Documenting the Reuse Assessment").

⁵ Please refer to Appendix 3-A, "Future Land Use Considerations", in the Feasibility Study for Operable Unit 2 of the Waukegan Harbor Site (November 6, 1998).

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Waukegan Harbor without considering the future use of the land surrounding the harbor?

2. Legal Necessity

With respect to the purported "legal necessity" to select the dredging alternative, the City assumes legal counsel at USEPA has undertaken an analysis of Section 121 of CERCLA, 42 U.S.C.A. §9621 and, specifically, §§ 121(b)(4)(F) and 121(e)(1), 42 U.S.C.A. §§ 9621(b)(4)(F) and 9621(e)(1). According to USEPA, the remedial action for Waukegan Harbor will be paid for by the Fund, not the PRPS⁶. Subsection (b)(4)(F) of Section 121 of CERCLA specifically authorizes the Administrator to waive compliance with any federal law when balancing competing demands on the Fund. Given the \$25,000,000 disparity between the dredging and capping alternatives, the City assumes the office of legal counsel has undertaken a thorough analysis of USEPA's authority to waive compliance with Sections 403 or 404 of the Clean Water Act, 33 U.S.C.A. §§ 403 and 1334 (relating to the requirements for permits for the placement of fill or obstructions in navigable waters of the United States). Indeed, we assume this is the analysis to which you referred in describing the "debate" among lawyers within USEPA over whether CERCLA "trumps" other federal statutes. (Please refer to p. 2 of our December 2, 2008 letter.)

3. Community Acceptance

The City was surprised to learn that the federal Maritime Administration is the author of the letter submitted to USEPA by the Waukegan Harbor Citizen's Advisory Group (CAG) on May 19, 2008 in support of the dredging alternative. As previously noted, on December 3, 2008, in partial response to the City's November 14 and August 8 Requests, you transmitted the CAG's May 19 letter via electronic mail (as an attached Word file named "May 19 2008.doc"). A review of the metadata within the Word file discloses the author of CAG's May 19 letter to be "Floyd Miras" at the "Maritime Administration". It is a cause of concern to the City that the Department of Commerce, NOAA or any other federal agency, may be using a "community organization" as a surrogate to advocate for the dredging alternative. It is important that the City receive a complete and timely response to its August 8 Request for "any and all communications" by, within or to USEPA concerning

⁶ A copy of Judge Kennelly's November 24, 2008 is enclosed as **Attachment 2**.

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selection of the harbor remedial alternative. It would be most unfortunate if the evidence cited by USEPA as "community acceptance" of the dredging alternative were merely USEPA, or some other federal agency(s), speaking through a "citizens group". The City, and no doubt the general public, would be interested to know why the federal Maritime Administration is drafting correspondence for the CAG to submit to USEPA.

USEPA and NOAA have not complied with the City's FOIA requests for documents relating to the purported rationale (economic benefit and legal necessity) for spending an additional \$25,000,000 on the dredging alternative. The City is unable to meaningful participate in the process of submitting of public comment on the proposed remedial alternative. Further, USEPA has not engaged in the type of consultation with the City required by the Executive Order on Federalism (referenced in our December 2, 2008 letter) and the Superfund Land Use Directive. We therefore request that the public comment period be extended until at least March 4, 2009. Assuming NOAA and USEPA promptly comply with the City's August 8 and November 14 Requests, the additional time will afford the City the opportunity to submit meaningful public comment on USEPA's proposed remedial alternative for Waukegan Harbor. The additional time will also afford the City and USEPA, which will have a new Administrator on January 20, 2008 (or shortly thereafter), to engage in the type of meaningful consultation contemplated by the Executive Order on Federalism and Superfund Land Use Directive.

Very truly yours,

Jeffery D. Jeep

cc: Mike Joyce (USEPA)
Robert A. Kaplan (USEPA)
Ray Vukovich (City of Waukegan)

JDJ/me

From:

Derek B. Rieman

To:

gage.fred@epa.gov;

cc:

Jeff Jeep;

Subject:

FOIA Request Confirmation

Date:

Tuesday, December 16, 2008 1:56:05 PM

Fred:

I would like to send this email confirming our phone conversation yesterday regarding the FOIA request that I submitted on November 14, 2008. The EPA's response is due December 16, 2008; however, you requested an extension, up to and including January 31, 2009, because you are awaiting responsive documents from Kevin Adler and EPA counsel. Due to the impending closure of the public comment period concerning the Waukegan Harbor Operable Unit #1 Record of Decision on February 4, 2009, you indicated that the extension could be shortened to January 25, 2009. Such an extension is agreeable.

Furthermore, you indicated that you would be able to provide responsive documents on a rolling basis.

Please see the following documents that we previously received via email from Kevin Adler that are responsive to the request so that you are not duplicating efforts.

July 2006 Risk Evaluation by RAC V
May 2008 RI (sent in parts)
5/15/08 Industry Coalition Letter
5/16/08 Memo from Todd Goeks
5/19/08 CAG Letter
9/10/08 Memo from Milt Clark
National Remedy Review Board Memo (undated but file named 9 30 2008)
10/13/08 CH2M Hill Risk Evaluation Calculations October 2008 FS Report (in parts).

If this is not your understanding of the conversation, please contact me at your convenience.

Kind regards,

Derek B. Rieman Jeep & Blazer, L.L.C. Environmental Law 24 N. Hillside Avenue, Suite A Hillside, Illinois 60162 (708) 236-0830 (Office)

ATTACHMENT 2

Page 1

--- F.Supp.2d ----

--- F.Supp.2d ----, 2008 WL 5024910 (N.D.III.)

(Cite as: 2008 WL 5024910 (N.D.III.))

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Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern
Division.

CITY OF WAUKEGAN, ILLINOIS, Plaintiff,

NATIONAL GYPSUM CO.; Bombardier Motor Corp. of America; Lafarge North America, Inc.; Lafarge Building Materials Inc., f/k/a Blue Circle, Inc.; St. Mary's Cement, Inc.; and Waukegan Port District, Defendants.

No. 07 C 5008.

Nov. 24, 2008.

Background: City brought action under Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and Illinois Water Pollutant Discharge Act (IWPDA) against gypsum company, cement company, industrial entity, and other defendants, stemming from alleged displacement of contaminated sediment at harbor site. After defendants' motions to dismiss were granted in part, 560 F.Supp.2d 636, and city filed second amended complaint, the District Court, 2008 WL 4201680, granted defendants' joint motion to dismiss on the ground the complaint was time-barred, but later vacated that ruling on reconsideration.

Holdings: Addressing the remaining grounds for dismissal, the District Court, Matthew F. Kennelly, J., held that:

- (1) city stated claim against gypsum company for owner liability;
- (2) delivery of goods to defendants by deep draft vessels, which allegedly stirred up the contaminated sediment, did not subject entities to operator liability;
- (3) city stated claim against gypsum company and industrial entity for operator liability;
- (4) bankruptcy of gypsum company's predecessor could not prevent city from asserting claim against company based on company's alleged actions after predecessor was discharged; and

(5) easement to cross land next to harbor and nonexclusive license to use portion of harbor did not subject industrial entity and cement company to owner liability.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure 170A \$\infty\$ 1832

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1832 k. Matters Considered

in General. Most Cited Cases

When considering a motion to dismiss, the court is not bound by a plaintiff's characterizations of the exhibits attached to its complaint and can independently examine those exhibits for inconsistencies between them and plaintiff's allegations. Fed.Rules Civ.Proc.Rule 10(c), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 673

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(B) Complaint
170AVII(B)1 In General
170Ak673 k. Claim for Relief in Gen-

eral. Most Cited Cases

Pursuant to the notice pleading standard, a plaintiff must provide only enough detail in a complaint to give the defendant fair notice of what the claim is and the grounds upon which it rests.

[3] Environmental Law 149E 673

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek673 k. Pleading, Petition, or Application. Most Cited Cases
CERCLA does not contain any heightened pleading

requirements. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., 42 U.S.C.A. § 9601 et seq.

[4] Environmental Law 149E \$\infty\$=445(1)

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek445 Persons Responsible
149Ek445(1) k. In General. Most Cited

Cases

City which incurred response costs in cleaning up contaminated sediment at harbor site stated claim against gypsum company for owner liability under CERCLA and Illinois Water Pollutant Discharge Act (IWPDA) by alleging that submerged land in harbor was part of Environmental Protection Agency's (EPA's) National Priority List (NPL) site, that the land had been leased to company, and that it had been submerged by sudden acts of excavation to create the harbor. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. § 9607(a); S.H.A. 415 ILCS 25/3 et seq.

[5] Navigable Waters 270 \$\infty\$ 36(1)

270 Navigable Waters
27011 Lands Under Water
270k36 Ownership and Control in General
270k36(1) k. Ownership by State. Most
Cited Cases

The rule that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found ap-

plies to lands under the navigable waters of the

Great Lakes.

[6] Navigable Waters 270 \$\iins\$44(3)

270 Navigable Waters
270III Riparian and Littoral Rights
270k44 Accretion and Reliction
270k44(3) k. Title to Land Formed by Ac-

cretion or Reliction. Most Cited Cases

Waters and Water Courses 405 € 33

405 Waters and Water Courses
405II Natural Water Courses
405II(E) Bed and Banks of Stream
405k93 k. Accretion and Reliction. Most
Cited Cases

Under Illinois law, an owner of real property bordering on the water's edge acquires title to any land which might be added by accretions and loses title to any land washed away by the water slowly over time.

[7] Navigable Waters 270 €= 45

270 Navigable Waters270III Riparian and Littoral Rights270k45 k. Avulsion. Most Cited Cases

Waters and Water Courses 405 5 94

405 Waters and Water Courses
405 II Natural Water Courses
405 II(E) Bed and Banks of Stream
405 k94 k. Avulsion. Most Cited Cases
Under Illinois law, where there is a sudden or
marked change in a shore line and the lands of the
adjoining owner are flooded or the course of a
stream changed, the adjoining owner is not thereby
divested of his title; such a loss of land is called an
"avulsion."

[8] Navigable Waters 270 € 345

270 Navigable Waters270III Riparian and Littoral Rights270k45 k. Avulsion. Most Cited Cases

Waters and Water Courses 405 5 94

405 Waters and Water Courses
405II Natural Water Courses
405II(E) Bed and Banks of Stream
405k94 k. Avulsion. Most Cited Cases
Under Illinois law, an avulsion does not change the

boundary line of property.

[9] Navigable Waters 270 \$\infty\$=45

270 Navigable Waters270III Riparian and Littoral Rights270k45 k. Avulsion. Most Cited Cases

Waters and Water Courses 405 € 34

405 Waters and Water Courses
405II Natural Water Courses
405II(E) Bed and Banks of Stream
405k94 k. Avulsion. Most Cited Cases
The same rules under the doctrine of avulsion apply
both to natural avulsions and artificial avulsions.

[10] Navigable Waters 270 € 36(1)

270 Navigable Waters
27011 Lands Under Water
270k36 Ownership and Control in General
270k36(1) k. Ownership by State. Most
Cited Cases

Navigable Waters 270 € 35

270 Navigable Waters
270III Riparian and Littoral Rights
270k45 k. Avulsion. Most Cited Cases
Under Illinois law, passage of the prescriptive period since the occurrence of alleged artificial avulsion that resulted in submerged land in harbor was not sufficient to divest lessee of its alleged title to the land and transfer title to the state; there was no contention that state had caused the avulsion or engaged in any other activity on the submerged land in the harbor. S.H.A. 735 ILCS 5/13-101.

[11] Adverse Possession 20 \$\infty\$=13

20 Adverse Possession
20I Nature and Requisites
20I(A) Acquisition of Rights by Prescription
in General

20k13 k. Character and Elements of Adverse Possession in General. Most Cited Cases

Under Illinois law, a party does not gain adverse possession simply through the passage of time; rather, it is necessary to prove hostile, open, and notorious use or possession of another's property for the entire prescriptive period. S.H.A. 735 ILCS 5/13-101.

[12] Environmental Law 149E \$\infty\$=445(1)

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek445 Persons Responsible
149Ek445(1) k. In General, Most Cited

Cases

Under CERCLA section providing that owners and operators of a vessel or facility are liable for necessary costs of response incurred by any other person or entity consistent with the national contingency plan, an "operator" is someone who directs the workings of, manages, or conducts the affairs of a facility -specifically, someone who manages, directs, or conducts operations that are related to the alleged release of hazardous waste or decisions about compliance with environmental regulations. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), 42 U.S.C.A. §§ 9601(20)(A), 9607(a).

[13] Environmental Law 149E \$\infty\$=445(1)

149E Environmental Law 149EIX Hazardous Waste or Materials 149Ek436 Response and Cleanup; Liability 149Ek445 Persons Responsible 149Ek445(1) k. In General. Most Cited

Cases

Delivery of goods to industrial entities operating near harbor by deep draft vessels, which allegedly stirred up sediment contaminated with polychlorinated biphenyls (PCBs) and thereby exacerbated contamination at harbor site, did not subject entities to operator liability for response costs under the CERCLA or the Illinois Water Pollutant Discharge Act (IWPDA), absent any indication that the entities exercised any direction over any aspect of the

delivery activity. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. § 9607(a); S.H.A. 415 ILCS 25/3 et seq.

[14] Environmental Law 149E \$\infty\$=445(1)

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek445 Persons Responsible
149Ek445(1) k, In General, Most Cited

Cases

City stated a claim against gypsum company and other industrial entity for operator liability under CERCLA and the Illinois Water Pollutant Discharge Act (IWPDA) by alleging that company and entity owned and operated vessels that traversed contaminated harbor and allegedly stirred up sediment contaminated with polychlorinated biphenyls (PCBs). Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. § 9607(a); S.H.A. 415 ILCS 25/3 et seq.

[15] Federal Civil Procedure 170A €== 1831

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1831 k. Fact Issues, Most

Cited Cases

Issue of whether gypsum company and other industrial entity were subject to operator liability for response costs under CERCLA and the Illinois Water Pollutant Discharge Act (IWPDA) based on the dredging of a portion of a harbor, which allegedly caused a further release of polychlorinated biphenyls (PCBs) in harbor, could not be resolved at motion to dismiss phase because of a factual dispute as to who specifically performed the work that caused the alleged release. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. § 9607(a); S.H.A. 415 ILCS 25/3 et seq.

[16] Environmental Law 149E \$\infty\$=445(1)

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek445 Persons Responsible
149Ek445(1) k. In General. Most Cited

Cases

City stated a claim against gypsum company for operator liability for response costs under CERCLA and the Illinois Water Pollutant Discharge Act (IWPDA), by alleging that as part of company's normal business operations, it was responsible for the maintenance of all lands under water of contaminated harbor lying within its leased premises, as well as lands under water leading to and adjoining such boundaries. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. § 9607(a); S.H.A. 415 ILCS 25/3 et seq.

[17] Environmental Law 149E 5 446

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek446 k. Covered Costs; Damages.

Most Cited Cases

City, which alleged that the release of polychlorinated biphenyls (PCBs) at harbor site caused it to incur response costs, sufficiently alleged response costs and causation as required to state claim to recover response costs under CERCLA against industrial entities operating near the harbor. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. § 9607(a).

[18] Environmental Law 149E \$\infty\$=446

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek446 k. Covered Costs; Damages.
Most Cited Cases

A plaintiff in a CERCLA action to recover response costs must prove that the release of a hazardous

substance by an appropriate defendant caused that plaintiff to incur response costs. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. § 9607(a).

[19] Bankruptcy 51 \$\infty\$ 3079

51 Bankruptcy

511X Administration

511X(B) Possession, Use, Sale, or Lease of Assets

51k3067 Sale or Assignment of Property 51k3079 k. Rights and Liabilities of Purchasers, and Right to Purchase. Most Cited Cases

Bankruptcy of gypsum company's predecessor could not prevent city from asserting claim for response costs against company under CERCLA based on company's alleged actions in connection with a contaminated harbor after its predecessor was discharged in bankruptcy, even though city's complaint contained various allegations regarding activity by company's predecessor prior to its discharge; allegations provided history and context regarding the harbor and established predecessor's ownership, which was subsequently passed on to the successor company. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. § 9607(a).

[20] Bankruptcy 51 \$\infty\$3079

51 Bankruptcy

511X Administration

511X(B) Possession, Use, Sale, or Lease of Assets

51k3067 Sale or Assignment of Property 51k3079 k. Rights and Liabilities of Purchasers, and Right to Purchase. Most Cited Cases

Following a discharge in bankruptcy, it is inappropriate for a plaintiff to assert a claim under CER-CLA against a successor to the discharged entity based on conduct for which a claim could have been made in the bankruptcy. Comprehensive Environmental Response, Compensation, and Liability

Act of 1980, § 101 et seq., 42 U.S.C.A. § 9601 et seq.

[21] Environmental Law 149E \$\infty\$ 445(1)

149E Environmental Law

149EIX Hazardous Waste or Materials 149Ek436 Response and Cleanup; Liability 149Ek445 Persons Responsible 149Ek445(1) k. In General. Most Cited

Cases

Property owners are subject to strict liability for response costs under CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., 42 U.S.C.A. § 9601 et seq.

[22] Environmental Law 149E \$\iins\$ 445(1)

149E Environmental Law

149EIX Hazardous Waste or Materials 149Ek436 Response and Cleanup; Liability 149Ek445 Persons Responsible 149Ek445(1) k. In General. Most Cited

Cases

Long-term contract for lease of parcel of land which ended about 50 feet from contaminated harbor did not subject lessee to owner liability for response costs in action by city under CERCLA and the Illinois Water Pollutant Discharge Act (IWPDA), stemming from alleged displacement at harbor site of sediment contaminated with polychlorinated biphenyls (PCBs), even though contract granted lessee an easement to cross the 50-foot strip of land leading to the harbor and a non-exclusive license to use a portion of harbor; lessee did not lease or own any submerged land or land going up to the edge of the shoreline. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. § 9607(a); S.H.A. 415 ILCS 25/3 et seq.

[23] Licenses 238 @== 43

238 Licenses

238II In Respect of Real Property

238k43 k. Nature of License in General. Most Cited Cases

Under Illinois law, a "license" in respect of real property is permission to do an act or a series of acts upon the land of another without possessing any estate or interest in such land.

[24] Easements 141 € == 1

141 Easements

1411 Creation, Existence, and Termination 141k1 k. Nature and Elements of Right. Most Cited Cases

Under Illinois law, an "easement" is a privilege in land existing distinct from ownership of the land.

[25] Environmental Law 149E \$\infty\$=411

149E Environmental Law 149EIX Hazardous Waste or Materials 149Ek409 Concurrent and Conflicting Statutes or Regulations

149Ek411 k. Federal Preemption. Most Cited Cases

States 360 € == 18.31

360 States

360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.31 k. Environment; Nuclear
Projects. Most Cited Cases

CERCLA did not preempt city's claims against industrial entities to recover cleanup costs under the Illinois Water Pollutant Discharge Act (IWPDA) based on alleged displacement of contaminated sediment at harbor site; IWPDA and CERCLA did not necessarily provide for the same removal costs and damages, and city's CERCLA claims and IWPDA claims potentially sought recovery for non-overlapping costs. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 114, 42 U.S.C.A. § 9614(b); S.H.A. 415 ILCS 25/3 et seq.

Michael S. Blazer, Derek B. Rieman, Jeep & Blazer, L.L.C., Hillside, IL, for Plaintiff.

Edward King Poor, Quarles & Brady LLP, Robert Martin Olian, Joan Radovich, Laura L. Leonard, Sidley Austin LLP, Ethan Allen Hastert, George James Tzanetopoulos, John C. Berghoff, Jr., Richard F. Bulger, Mayer Brown LLP, Thomas Douglas Lupo, Williams Montgomery & John Ltd., Chicago, IL, David Andrew Strifling, Vilan Odekar, Quarles & Brady LLP, Milwaukee, WI, Charles S. Hegarty, Diane L. Akers, Fredrick John Dindoffer, Bodman LLP, Detroit, MI, for Defendants.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

*1 In this action under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) and the Illinois Water Pollutant Discharge Act (IWPDA), the City of Waukegan (Waukegan) has sued several entities for damages and declaratory relief connected with contamination in Waukegan Harbor. National Gypsum Co. (National Gypsum), LaFarge North America, Inc. (LaFarge), LaFarge Building Materials, Inc. (LBM and, collectively with LaFarge, the LaFarge Defendants), and St. Mary's Cement, Inc. (St.Mary's) have jointly moved to dismiss all of Waukegan's claims and have also filed individual motions to dismiss.

The Court previously granted the joint motion to dismiss on the ground that Waukegan's complaint was time-barred. City of Waukegan v. Nat'l Gypsum Co., No. 07 C 5008, 2008 WL 4201680 (N.D.III. Sept.8, 2008). The Court later vacated that ruling on Waukegan's motion for reconsideration, concluding that given the standard applicable on a motion to dismiss, the Court could not definitively determine-as it had in its original ruling-that Waukegan's CERCLA claim sought only to recover response costs relating to a "remedial action" as CERCLA defines that term.

The Court therefore turns to the remaining grounds for dismissal cited by the defendants. For the reas--- F.Supp.2d ----, 2008 WL 5024910 (N.D.III.)

(Cite as: 2008 WL 5024910 (N.D.III.))

ons set forth below, the Court grants in part and denies in part the common motion to dismiss and the LaFarge Defendants' motion to dismiss; denies National Gypsum's motion to dismiss; and grants St. Mary's motion to dismiss.

Factual Background

[1] When considering a motion to dismiss, the Court accepts as true the complaint's factual allegations and draws reasonable inferences in favor of the plaintiff. See, e.g., Killingsworth v. HSBC Bank Nevada, N.A., 507 F.3d 614, 617 (7th Cir.2007). The Court treats exhibits to a complaint as part of the complaint. Fed.R.Civ.P. 10(c). The Court is not bound by Waukegan's characterizations of the exhibits attached to its complaint and can independently examine those exhibits for inconsistencies between them and Waukegan's allegations. FN2 See, e.g., 188 LLC v. Trinity Indus., Inc., 300 F.3d 730, 735 (7th Cir.2002); Rosenblum v. Travelbyus.com, Ltd., 299 F.3d 657, 661 (7th Cir.2002).

In its complaint, Waukegan alleges that the harbor is contaminated with polychlorinated biphenyls (PCBs) that were discharged into and around the harbor by the now-defunct Outboard Marine Corp. (OMC), a marine products manufacturer. Substantial quantities of PCBs are present in the sediment located on submerged lands throughout the harbor. In the 1980's, the United States Environmental Protection Agency (USEPA) put the harbor and some of the surrounding land on the National Priorities List (NPL). "The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation."See tp://www.epa.gov/superfund/sites/npl/ (visited Nov. 14, 2008). Waukegan's claims against the defendants in this case encompass a portion of the NPL site in and around portions of the harbor (the Facility). In 1992, OMC completed a remediation project that involved dredging, treating, and disposing of around a million pounds of PCBcontaminated sediments. Despite these efforts, sediments in portions of the harbor are still contaminated with PCBs above the regulatory limit of one part per one million. In 2000, OMC closed its plants in the area of the harbor and filed for bank-ruptcy.

*2 National Gypsum, the LaFarge Defendants, and St. Mary's are entities with business operations adjacent to or near the harbor. Each utilizes the harbor as part of those operations. In its complaint, Waukegan traces the ownership of the land around and underneath the harbor back to 1846, when it was purchased by John Lewis. At that time, portions of the harbor that are submerged today were dry land and were part of what Lewis purchased. The shoreline that constituted the eastern boundary of Lewis' property along Lake Michigan was extended eastward over time. The harbor, as it exists today, was subsequently created when, on several occasions, certain portions of Lewis' land were excavated and dredged.

Waukegan alleges that following various transfers over time, title to portions of Lewis' land came to reside with the Elgin, Joliet & Eastern Railway Company (EJ & E) and the Port District. EJ & E and the Port District subsequently entered into long-term leases of land bordering or located near the harbor with National Gypsum, the LaFarge Defendants, and St. Mary's. The particulars of each of those leases are discussed in further detail below.

Waukegan alleges that conduct by the defendants has exacerbated the PCB-contamination problem in the Facility. Waukegan alleges that National Gypsum, the LaFarge Defendants, and St. Mary's operate docking and mooring facilities in the harbor, maintain portions of the harbor, and have arranged for "large deep draft cargo vessels" to traverse and dock in the harbor.2d Am. Compl. ¶ 78. Those vessels allegedly "generate prop wash that disturbs, suspends and redistributes contaminated sediments throughout the Harbor. Such disturbances have mixed sediments into the water column, disrupted the benthic zone, and influenced Harbor water quality, thus exacerbating the PCB contamination in the Harbor." Id. ¶ --- F.Supp.2d ----, 2008 WL 5024910 (N.D.III.)

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79. Waukegan also claims that National Gypsum and LaFarge own some of the vessels that have engaged in this activity. Additionally, Waukegan alleges that National Gypsum maintains submerged lands that are part of its leased premises. In or around 2000, a portion of the harbor was dredged following a request to do so by National Gypsum, LBM, and LaFarge. That dredging allegedly "caused PCB contaminated sediment to escape ... during the dredging process, resulting in the disturbance, suspension and redistribution of PCB-contaminated sediments in the Harbor." Id. ¶ 76.

As a result of the PCB-contamination present in the Facility and due to defendants' alleged conduct, Waukegan says, it "has incurred, and will continue to incur, response costs in connection with the investigation of the PCBs at the Facility and potential remedial actions ... within the meaning and scope of CERCLA." Id. ¶¶ 94-95. Waukegan makes similar claims under the IWPDA.

Discussion

[2][3] The Seventh Circuit has emphasized that, even after the Supreme Court's ruling in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), federal courts continue to adhere to a notice pleading standard. *E.g., Tamayo v. Blagojevich*. 526 F.3d 1074, 1083-84 (7th Cir.2008)."A plaintiff must still provide only enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests...." *Id.* at 1083 (quotation omitted)."CERCLA does not contain any heightened pleading requirements." *City of Waco v. Schouten*, 385 F.Supp.2d 595, 600 (W.D.Tex.2005).

1. CERCLA claims

*3 Under section 107(a) of CERCLA, various categories of persons and entities are liable for "necessary costs of response" incurred by any other person or entity consistent with the "national contingency plan," a phrase defined by the statute to

denote sites identified by the USEPA as requiring cleanup. See42 U.S.C. §§ 9607(a), 9601(31). The categories of those liable include "the owner and operator of a vessel or a facility [and] any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of ... from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance..."Id. § 9607(a)(1)-(2). A "facility" includes "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." Id. § 9601(9). A "[r]elease" is defined in CERCLA to include, with exceptions irrelevant in this case, "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leachdumping, into or disposing the environment." Id. § 9601(22).

The motions to dismiss do not challenge whether the Facility, as alleged in the complaint, is a "facility" for purposes of CERCLA or that "releases" have occurred. Instead, National Gypsum, the LaFarge Defendants, and St. Mary's argue that Waukegan has not sufficiently alleged that they were owners or operators within the meaning of CERCLA. They also contend that Waukegan has not alleged the requisite causation.

a. National Gypsum

Waukegan alleges that National Gypsum is liable under CERCLA both as an owner and as an operator. As set forth below, Waukegan has stated a viable claim in each of these respects.

i. Owner liability

[4] In 1956, part of the land in the area of the harbor owned by EJ & E was leased to National Gypsum's predecessor, also called National Gypsum Company (Old Gypsum). Old Gypsum received a discharge in bankruptcy in 1993, at which time it assigned to National Gypsum its rights and

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interests in the lease with EJ & E. That lease was for a term of seventy years. The lease allegedly included portions of the original property owned by Lewis, subsequently acquired by EJ & E, that are now submerged and form part of the Facility. The lease also required National Gypsum to pay taxes on the property, permitted assignment and subletting, allowed National Gypsum to make changes and improvements to the leased property-including "lands under water leading to and adjoining such boundaries"-and required National Gypsum to maintain the leased property at its own expense. National Gypsum does not contest that a lessee with these rights and obligations can be considered an owner for purposes of section 107(a) of CER-CLA. See, e.g., Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 328 (2d Cir.2000); Burlington N.R. Co. v. Woods Indus., Inc., 815 F.Supp. 1384, 1391 (E.D.Wash.1993).

*4 [5] National Gypsum contends, in the common motion, that it is not subject to owner liability under CERCLA because it is not the owner of a portion of the Facility. National Gypsum argues that the actual owner of that property is the State of Illinois because the area in question is submerged under water in the harbor. To make this argument, National Gypsum relies primarily on Illinois Central R. Co. v. Illinois, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). In that case, the Supreme Court stated: "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found...." Id. at 435. This rule applies to "lands under the navigable waters of the Great Lakes." Id. at 437. Based on this authority, the Court dismissed the ownership claims against National Gypsum contained in Waukegan's amended complaint. City of Waukegan v. Nat'l Gypsum Co., 560 F.Supp.2d 636, 640, 643-44 (N.D.III.2008). The amended complaint contained only a very general allegation that National Gypsum "owned and/ or operated land within the Facility at the time of disposal or where contaminants have come to be

located." Id. at 643.

By contrast, the second amended complaint contains much more specific allegations regarding National Gypsum's alleged ownership of part of the Facility, as detailed above. Importantly, the second amended complaint also adds allegations concerning the submerged lands in the harbor. These lands, which are part of the Facility, were allegedly part of the property owned by Lewis that was subsequently conveyed to EJ & E and leased to National Gypsum. According to the complaint, these lands were not slowly submerged over time; rather, they were subject to sudden flooding and submersion due to excavation and other activities. Based on these allegations, Waukegan argues that the submersion of the lands underneath the harbor resulted from avulsions and that ownership of those lands remains with private parties, not the State of Illinois.

[6][7][8][9] An owner of real property bordering on the water's edge acquires "title to any land which might be added by accretions" and loses title to any land washed away by the water slowly over time. Schulte v. Warren, 218 Ill. 108, 118, 75 N.E. 783, 785 (1905). By contrast, "[w]here there is a sudden or marked change in the shore line and the lands of the adjoining owner are flooded or the course of a stream changed, the adjoining owner is not thereby divested of his title." Id. (finding landowner did not lose title to property that became submerged after construction of a dam and lock altered the course of a river). Such a loss of land is called an avulsion. "An avulsion, it is settled, does not change the boundary line" of property. Wall v. Chicago Park Dist., 378 III. 81, 97, 37 N.E.2d 752, 760 (1941); see also Comm'rs of Lincoln Park v. Fahrney, 250 III. 256, 265-66, 95 N.E. 194, 198 (1911). Defendants' attempt to distinguish Schulte misses the mark. Even though that case involved a different factual scenario, the general principles regarding avulsion announced by the Illinois Supreme Court in Schulte and the other Illinois cases cited are clear. The doctrine of avulsion is generally accepted as part of the

common law throughout the United States. See New Jersey v. New York, 523 U.S. 767, 784, 118 S.Ct. 1726, 140 L.Ed.2d 993 (1998). The same rules apply both to natural avulsions (e.g., a sudden storm or flood) and artificial avulsions (e.g., excavation along waterfront property). E.g., J.P. Furlong Enters., Inc. v. Sun Exploration & Prod. Co., 423 N.W.2d 130, 134 (N.D.1988); Cinque Bambini P'ship v. State, 491 So.2d 508, 520 (Miss.1986).

*5 The complaint alleges that the submerged land in the harbor is part of the Facility, has been leased to National Gypsum, and became submerged by sudden acts of excavation that occurred to create the harbor. Avulsive changes to the shoreline would not divest EJ & E or its lessee, National Gypsum, of their property rights. These allegations are sufficient to state a claim for owner liability against National Gypsum under CERCLA. If proven, Waukegan's allegations would render National Gypsum the owner of some of the submerged lands in the Facility.

[10] National Gypsum argues that, even if an avulsion has been pleaded, the State is still the owner of the submerged lands because the requisite period for prescriptive rights has passed. See735 ILCS 5/13-101 (prescription period in Illinois is twenty years). To support this argument, National Gypsum cites two cases holding that when artificially avulsed land is submerged for the entire prescriptive period, title to the submerged lands transfers to the state. See State v. Hatchie Coon Hunting & Fishing Club, Inc., ---S.W.3d ----, 2008 WL 598143, at *3-4 (Ark. Mar.6, 2008); State v. Superior Court of Placer County, 29 Cal.3d 240, 248-49, 172 Cal.Rptr. 713, 625 P.2d 256, 261 (1981). In both the Arkansas and California cases, several justices dissented. The parties do not cite any Illinois authority adopting this change from the ordinary rule of avulsion; indeed, the Illinois Supreme Court in Schulte expressly declined to address the issue of prescriptive rights. Schulte, 218 Ill. at 117, 75 N.E. at 784. This variance from the usual rule of avulsion has not been widely addressed; several courts, however, have found no such change. See Town of Hempstead v. Little, 20 A.D.2d 539, 540, 245 N.Y.S.2d 407, 409 (1963) (holding title to avulsed land remained with original owner "regardless of the intervening length of time"); Kansas v. Meriwether, 182 F. 457, 460 (8th Cir.1910) (noting that following an avulsion, title to property would not inure to the state even after twenty years had passed). Given the absence of any Illinois authority modifying the ordinary rule of avulsion and the lack of widespread authority in other states doing so, the Court declines to find that Illinois law contains the exception to the general rule of avulsion announced in the Arkansas and California cases cited by defendants.

[11] Notably, in the Arkansas and California cases, the changes in the water lines affecting the property rights had occurred due to the actions of state officials; specifically, state agents erected and controlled dams or other instrumentalities that affected the water level and submerged the lands in question. Hatchie Coon Hunting & Fishing Club, Inc., --- S.W.3d at ----, 2008 WL 598143, at *1-2; Superior Court of Placer County, 29 Cal.3d at 248-49, 172 Cal. Rptr. 713, 625 P.2d at 261. Thus, in the cases cited by defendants, the states that gained title to submerged lands had actually engaged in open and notorious activity on the land of the former owners-flooding the lands. In Illinois, like most other jurisdictions, a party does not gain adverse possession simply through the passage of time; rather, it is necessary to prove hostile, open, and notorious use or possession of another's property for the entire prescriptive period. E.g., Stankewitz v. Boho, 287 Ill.App.3d 515, 518, 223 Ill.Dec. 116, 678 N.E.2d 1247, 1249 (1997). In this case, there has been no contention that the State of Illinois caused the avulsion or engaged in any other activity on the submerged lands in the harbor. Even if the prescriptive period has passed, the types of facts that ordinarily give rise to adverse possession are absent in this case. In the Court's view, passage of the prescriptive period, standing alone, does not alter the application of the doctrine of avulsion in this

case so as to defeat Waukegan's claims.

*6 Finally, National Gypsum complains of the "monumental evidentiary problem" in determining the shoreline of Lake Michigan from the mid-1800s through the current date. Common Mot. at 12. To the extent there is a problem, it is Waukegan's. Waukegan will have the burden to prove owner liability under CERCLA, and if Waukegan is unable to produce such evidence, defendants will be free to seek summary judgment. This is not, however, a reason to dismiss Waukegan's claim at the pleading stage. See Burns v. Paddock. 503 F.2d 18, 25 (7th Cir.1974) ("Speculation on the difficulties of proof should not ... figure in the disposition of a motion to dismiss.").

ii. Operator liability

[12] Under section 107(a) of CERCLA, an operator is "someone who directs the workings of, manages, or conducts the affairs of a facility"-specifically, someone who manages, directs, or conducts operations that are related to the alleged release of hazardous waste or decisions about compliance with environmental regulations. *United States v. Best-foods*, 524 U.S. 51, 66-67, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). The Court discussed the *Best-foods* decision at length in its April 7, 2008 opinion in this case. *See City of Waukegan*, 560 F.Supp.2d at 644.

[13] Waukegan identifies several different activities by National Gypsum as the basis for operator liability. The first involves prop wash from large vessels making deliveries to National Gypsum, which allegedly stirs up PCB-contaminated sediment in the harbor, thereby exacerbating the contamination in the Facility. This Court dismissed the prop wash operator claims in Waukegan's amended complaint because

nothing in the amended complaint suggests that any of the defendants exercised any direction over any aspect of these shipping activities claimed to have caused the releases at issue in this case-specifically, the use of "deep-draft" vessels that caused the PCB-contaminated sediments on the harbor floor to be stirred up and redistributed. Specifically, Waukegan does not allege that any of the private defendants exercised any direction over what vessels would be used or how they would traverse the Harbor, or that it managed or otherwise conducted those activities.

Id. at 645.Nothing in the second amended complaint affects this analysis. Accordingly, the Court dismisses the operator claim against National Gypsum based on delivery of goods by deep draft vessels.

[14] A closer question is the related allegation, made for the first time in the second amended complaint, that National Gypsum actually owns and operates some of the vessels that traverse the harbor. Though the document attached to the complaint in support of this proposition does not clearly support this allegation, that document does not refute it either. This Court considered the potential liability of vessel owners as operators in its April 2008, decision:

The entities that owned the vessels that traversed the Harbor conceivably could be said to have conducted the activities in the Harbor that caused the alleged releases, and thus to be operators of the harbor with respect to those activities. An independent contractor like the vessel owners is not liable as an operator if it lacks control over the pollution-creating operations, see generally Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157-59 (7th Cir.1988), but a contractor may be liable as an operator if it had the authority to control the cause of the contamination at the time of the release of hazardous substances. See Kaiser Aluminum & Chem. Corp. v. Catellus Devel. Corp., 976 F.2d 1338, 1341-42 (9th Cir.1992) (discussing Edward Hines Lumber; citing Nurad, Inc. v. Hooper & Sons Co., 966 F.2d 837, 942 (4th Cir.1992) and CPC Int'l, Inc. v. Aerojet-General Corp., 731 F.Supp. 783,

788 (E.D.Mich.1989)). See also, Ganton Techs., Inc. v. Quadion Corp., 834 F.Supp. 1018, 1022 (N.D.Ill.1993) (pollution clean-up contractor claimed to have made pollution worse could be sued as operator of site; relying on Kaiser Aluminum). The fact that the Harbor may be run or managed by others does not eliminate the possibility that someone in the position of a vessel owner can be an operator for purposes of CERCLA. In this regard, the Supreme Court's saboteur example in Bestfoods is instructive: the Court, in discussing the scope of operator liability, indicated that "a saboteur who sneaks into the facility at night to discharge its poisons out of malice" could be sued as an operator of the facility. Bestfoods, 524 U.S. at 65.

*7 Id. at 645. Operating a vessel that causes a release of hazardous substances may not be the equivalent of breaking into a facility to maliciously discharge such substances, but it implies a greater degree of control than just contracting for vessels to make deliveries. Though it is an open question whether Waukegan ultimately will be able to establish operator liability under this theory, its allegations are sufficient to permit its operator claim to survive a motion to dismiss. The cases cited in the common motion to the contrary are distinguishable. United States v. Qwest Corp., 353 See, e.g., F.Supp.2d 1048, 1051-52 (D.Minn.2005) (granting motion to dismiss operator claims where defendant performed work outside of the alleged facility, had no control over the facility, and was unaware that the facility existed); Redevelopment Agency of Stockton v. Burlington N. & Santa Fe Ry. Corp., No. S-05-02087, 2007 WL 1793755, at *5 (E.D.Cal. June 19, 2007) (railroad company found not to be an operator where it was not aware of and did not maintain a drain pipe that served as a conduit for hazardous material).

[15] Waukegan's third operator claim against National Gypsum is based on the dredging of a portion of the harbor that was proposed by National Gypsum and the LaFarge Defendants in 2000 and

that took place sometime later. Allegedly, this activity caused a further release of PCBs by spreading and redistributing them within the Facility. Defendants correctly point out that the complaint does not allege who specifically performed the work that caused this alleged release. It is possible that, if the work was performed by a contractor, National Gypsum would not be liable as an operator. This determination, however, requires an examination of the facts that is more appropriately done at either summary judgment or trial. Waukegan has alleged that National Gypsum was responsible for dredging activities that caused a release of PCBcontaminated sediment within the Facility, and those allegations are sufficient under a notice pleading standard to state a claim for operator liability under CERCLA.

[16] Last, Waukegan alleges operator liability against National Gypsum by claiming that, "as part of [National] Gypsum's normal business operations, it ... is responsible for the maintenance of all lands under water lying within its leased premises, as well as lands under water leading to and adjoining such boundaries" 2d Am. Compl. ¶ 83. If proven, this allegation could lead to a finding that National Gypsum "directs the workings of, manages, or conducts the affairs" of the Facility (or a portion of it). Bestfoods, 524 U.S. at 66-67. Accordingly, Waukegan may also maintain its operator claim against National Gypsum based on this allegation.

iii. Causation

[17][18] National Gypsum next argues that the complaint should be dismissed because it does not adequately plead causation. As the common motion points out, a plaintiff in a CERCLA action must prove that the release of a hazardous substance by an appropriate defendant caused that plaintiff to incur response costs. See Krygoski Constr. Co. v. City of Menominee, 431 F.Supp.2d 755, 763 (W.D.Mich.2006). Waukegan alleges that the release of PCBs in the Facility "have caused the City

to incur 'response costs' within the meaning and scope of CERCLA.... The City has incurred, and will continue to incur, response costs in connection with the investigation of the PCBs at the Facility and potential remedial actions" 2d Am. Compl. ¶¶ 94-95. These allegations, under a notice pleading standard, are sufficient to state a CERCLA claim.

*8 The cases defendants cite in the common motion do not support their contention that Waukegan has failed to allege causation sufficiently. First, most of those cases dealt with a plaintiff's failure to present evidence of causation at summary judgment-not failure to plead causation. See Krygoski Constr. Co., 431 F.Supp.2d at 757, 763; Rhodes v. County of Darlington, 833 F.Supp. 1163, 1167, 1191-92 (D.S.C.1992); see also Young v. United States, 394 F.3d 858, 864 (10th Cir.2005) (holding summary judgment appropriate because of absence of proof of response costs where property remained contaminated and plaintiffs did not intend to cleanup property in the future).

Defendants also rely on McGregor v. Industrial Excess Landfill, Inc., 856 F.2d 39 (6th Cir.1988), in which dismissal of a CERCLA claim pursuant to Rule 12(b)(6) was held appropriate because the plaintiffs had not alleged causation. That case is distinguishable. There, the plaintiffs, individuals and a putative class of similarly situated individuals, alleged with specificity the response costs incurred by various governmental agencies but made no such allegations regarding their own response costs. Id. at 42-43. Thus, the plaintiffs had alleged specific facts on the same point regarding others but left a telling silence with respect to their own response costs. The McGregor court, however, did not hold that a CERCLA plaintiff must always identify its specific response costs in its complaint. $F^{N4}Id$. Under the notice pleading standard, Waukegan has sufficiently alleged response costs and causation.

iv. Old Gypsum's bankruptcy

[19] National Gypsum also argues Waukegan's claims against it should be dismissed based on the bankruptcy discharge that Old Gypsum received in 1993. Essentially, National Gypsum contends that Waukegan is improperly attempting to assert claims against it based on actions taken by Old Gypsum.

[20][21] Following a discharge in bankruptcy, it is inappropriate for a plaintiff to assert a CERCLA claim against a successor to the discharged entity based on conduct for which a claim could have been made in the bankruptcy. See In re Chicago Milwaukee St. Paul & Pac. Ry. Co., 3 F.3d 200, 202-03 (7th Cir.1993). This rule is merely an application of the general principle that bankruptcy provides a fresh start free from pre-bankruptcy claims. See In re Duke, 79 F.3d 43, 44 (7th Cir.1996) (noting that "bankruptcy is normally viewed as a process through which a debtor obtains relief from pre-petition obligations and gets a fresh start"). Despite these undisputed legal propositions, National Gypsum's argument regarding Old Gypsum's bankruptcy fails. Waukegan is not seeking to impose liability on National Gypsum for Old Gypsum's pre-bankruptcy obligations. Rather, Waukegan's claims are based on (1) National Gypsum's alleged ownership of a portion of the Facility from 1993 through the present; and (2) National Gypsum's alleged operation of a portion of the Facility after 1993. Property owners are subject to strict liability under CERCLA. NutraSweet Co. v. X-L Eng'g Co., 227 F.3d 776, 783 (7th Cir.2000). National Gypsum's alleged actions as an operator, including the 2000-dredging project, also occurred after Old Gypsum was discharged.

*9 Waukegan's complaint contains various allegations regarding activity by Old Gypsum in the harbor going back to the 1950s. Those allegations are, presumably, not the basis for operator liability; rather, they provide history and context regarding the harbor and establish Old Gypsum's ownership, which was subsequently passed on to National Gypsum. Waukegan may not pursue an operator claim against National Gypsum based on activities

conducted by Old Gypsum. But Old Gypsum's bankruptcy has no affect on the CERCLA claims Waukegan asserts in the complaint.

b. The LaFarge Defendants

Waukegan has also asserted claims for both owner and operator liability under CERCLA against the LaFarge Defendants. For the same reasons discussed with respect to National Gypsum, Waukegan has stated a claim for operator liability against the LaFarge Defendants based on their alleged conduct with respect to the dredging of the submerged land under the harbor. Waukegan has also stated a claim against LaFarge based on vessel ownership. The remainder of the operator allegations against the LaFarge Defendants, based on prop wash, fail to state a claim.

[22] Waukegan's complaint does not, however, state a claim for owner liability under CERCLA against LaFarge. The main reason is that, even though LaFarge has entered into a long-term contract with the Port District, LaFarge does not lease any land or property going up to the edge of the shoreline. Instead, its leased property ends approximately fifty feet from the harbor and the lake. Even though a long-term lessee can be an owner for CERCLA purposes, that rule would not impose owner liability on LaFarge because it does not lease or own either submerged lands or property on the shoreline. Similarly, Waukegan has not made allegations against LBM that would support an owner liability claim.

The contract between LaFarge and the Port District grants LaFarge an "easement, license, privilege and permit" to construct and operate conveyors on the fifty-foot strip of land leading to the harbor docks and for its employees to cross that strip.2d Am. Compl. Ex. Y ¶ 13. That contract also grants LaFarge the nonexclusive right to use portions of the harbor dock upon giving the Port District forty-eight hours notice. It does not, however, require LaFarge to "maintain the said dock in good condi-

tion"-that obligation belongs to the Port District. *Id.* ¶ 10.Nor does LaFarge actually lease the land containing the easement or the harbor.

[23][24]"A license in respect of real property ... is permission to do an act or a series of acts upon the land of another without possessing any estate or interest in such land.... [A]n easement is a privilege in land existing distinct from ownership of the land." Mueller v. Keller, 18 III.2d 334, 340, 164 N.E.2d 32 (1960) (citations omitted). Based on this principle, the Ninth Circuit found that an easement holder was not an "owner" for purposes of CER-CLA. See Long Beach Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1368-69 (9th Cir. 1994). The fact that LaFarge holds an easement to cross the land leading to the harbor and a license to use, on a nonexclusive basis, a portion of the harbor does not transform it into a lessee, much less an owner, of that property. FN5 Accordingly, the Court dismisses Waukegan's CERCLA claim based on owner liability against the LaFarge Defendants.

c. St. Mary's

*10 Waukegan has failed to state a claim against St. Mary's for operator liability under CERCLA. As detailed above and in the Court's April 7, 2008 decision, causing someone else's vessels to enter the harbor as part of regular business activities is not enough to impose operator liability against St. Mary's. Unlike National Gypsum and the LaFarge Defendants, Waukegan does not make any additional allegations against St. Mary's that could form the basis for operator liability.

Waukegan likewise has failed to state a claim for owner liability against St. Mary's. Similar to the owner liability allegations against the LaFarge Defendants, Waukegan has not alleged that St. Mary's is the owner or lessee of land adjacent to the shoreline, submerged lands, or the harbor itself. The complaint includes as an exhibit a contract between St. Mary's predecessor and the Port Dis-

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trict. That contract only grants St. Mary's an easement to cross land leading up to the harbor dock and a license to use the harbor dock. For the same reasons discussed with respect to LaFarge, the contract between St. Mary's and the Port District for an easement and license is not enough to make St. Mary's an owner for CERCLA purposes.

2. IWPDA claims

The IWPDA prohibits the "discharge" of oil or "other pollutants" directly or indirectly into the waters of Illinois and authorizes any governmental body having such waters within its territorial limits to arrange for the pollutants' removal. 415 ILCS 25/3, 4. "'Discharge' includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping," and the term "other pollutants" is defined to mean "any floating materials which may cause unsightly appearance on the surface of such waters or are detrimental to aquatic life or the water quality of such waters" Id. 25/2(b)-(c). Liability is imposed on owners and operators. Id. 25/5. The statutory definition of the term "owner or operator," like that contained in CER-CLA, is not particularly illuminating; the IWPDA says that this term "means any person owning or operating any facility." Id. 25/2(h). But there is no basis to believe that this term has a meaning that differs from that which applies under CERCLA.

Given these similarities, Waukegan has stated claims under the IWPDA to the same extent it has stated claims under CERCLA. In other words, Waukegan has stated claims under the IWPDA against National Gypsum for owner liability and against National Gypsum and the LaFarge Defendants for operator liability consistent with the preceding discussion. The IWPDA claims against St. Mary's are dismissed.

[25] The defendants also argue that CERCLA preempts the IWPDA claims. CERCLA preempts state-law actions only to the extent that the state-law action would "provide compensation for the same re-

moval costs or damages" as a corresponding CER-CLA action. 42 U.S.C. § 9614(b); Ashtabula River Corp. Group II v. Conrail, Inc., 549 F.Supp.2d 981, 985-86 (N.D.Ohio 2008). The IWPDA and CER-CLA do not necessarily provide "for the same removal costs or damages."First, the IWPDA provides for recovery of attorney's fees-CERCLA does not. Second, it is possible that some of the remediation costs Waukegan allegedly incurred could be recoverable under the IWPDA but not CERCLA. For example, response costs can only be recovered under CERCLA to the extent they are consistent with the NCP. 42 U.S.C. § 9607(a)(4). The IWPDA does not contain such a limitation. 415 ILCS 25/5. Because the two claims potentially seek recovery for non-overlapping costs, the Court declines to dismiss the IWPDA claim. See New York v. Ametek, Inc., 473 F.Supp.2d 432, 433-34 (S.D.N.Y.2007). It may be necessary to address this point again later, once evidence regarding damages has been made part of the record.

Conclusion

*11 For the reasons stated above, the Court grants the motion to dismiss filed by defendant St. Mary's [docket no. 119]. The Court grants the common motion to dismiss with respect to operator liability based on prop wash but otherwise denies that motion [docket no. 125]. National Gypsum's individual motion is denied [docket no. 117]. The LaFarge Defendants' motion is granted with respect to owner liability but is otherwise denied [docket no. 123]. In sum, Waukegan may maintain claims pursuant to CERCLA and the IWPDA against National Gypsum for owner liability and operator liability based on dredging activities, ownership and operation of vessels, and maintenance of the Facility and against LaFarge and LBM for operator liability based on dredging activities and ownership of vessels. National Gypsum, LaFarge, and LBM are directed to answer the remaining claims by December 8, 2008. This matter is set for status hearing on December 15, 2008 at 9:30 a.m. Counsel are directed to confer prior to that date to develop a pro-

posed schedule for discovery.

FN1. Waukegan Port District (the Port District) joined the common motion to dismiss, and also made an individual motion to dismiss. After those motions were filed, Waukegan voluntarily dismissed its claims against the Port District pursuant to Federal Rule of Civil Procedure 41.

FN2. Unless otherwise specified, references to the complaint in this opinion mean Waukegan's second amended complaint.

FN3. National Gypsum argues that if the owner liability claims against it are not dismissed, additional parties, including the State of Illinois and EJ & E, are necessary parties that must be joined pursuant to Federal Rule of Civil Procedure 19. The Court expresses no opinion on this contention at this time because it has only been addressed in a cursory manner. To the extent defendants seek to join additional parties, they should file an appropriate motion fully framing the issue.

FN4. To the extent another case cited by defendants, General Cable Industries, Inc. v. Zurn Pex, Inc., 561 F.Supp.2d 653 (E.D.Tex.2006), implies such a rule, the Court declines to follow that decision.

FN5. Waukegan argues that LaFarge is a lessee and an owner because the easement and license to use the harbor docks are an integral and important part of the contract. Though it is undoubtedly true that without the easement and dock usage rights LaFarge would not have leased any land from the Port District, Waukegan does not explain why or offer any authority in support of its contention that this fact transforms LaFarge into a lessee and *de facto* owner for CERCLA purposes.

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